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Juliafitriani bt Baharuddin & Anor v Rosdoni bt Rashid

B

HIGH COURT (KUALA LUMPUR) — WRIT OF SUMMONS NO WA-23CY-72–12 OF 2019
MOHD NAZLAN J
17 MAY 2021

C

Civil Procedure — Setting aside — Judgment in default — Whether application to set aside was filed within time — Whether service of cause papers regular — Whether presumption of service of cause papers rebutted — Whether judgment in default regular — Whether judgment in default ought to be set aside

D

This was the application by the defendant to set aside a judgment in default ('JID') obtained by the plaintiffs. The plaintiffs were spouses. The second plaintiff was formerly the husband of the defendant. It was the plaintiff's case that the defendant had uploaded a posting on her Facebook account which contained several defamatory and false statements, and which put a negative light on the image and personality of the plaintiffs. In consequence, the plaintiffs had sent out a letter of demand to the defendant seeking, among others, a formal apology from the defendant, as well as a sum of RM1m to each of the plaintiffs, attributed to the said defamatory postings. As the defendant did not accede to the demand, the plaintiffs proceeded to file a writ action on 24 December 2019, which writ and statement of claim were allegedly served on the defendant on 27 December 2019. As the defendant did not file a memorandum of appearance, the plaintiffs obtained a JID against the defendant on 20 February 2020. In pursuing the enforcement of the JID, the plaintiffs obtained on 13 October 2020, a *perintah taksiran ganti rugi* dated 9 October 2020 in respect of which the defendant was ordered to pay, among others, damages assessed at RM300,000 to the plaintiffs. The defendant surfaced again on 30 November 2020 when she filed a notice of application vide encl 28 pursuant to O 42 r 13 of the Rules of Court 2012 ('the RC 2012') to set aside the JID of 20 February 2020. The crux of the defendant's contention was that service of the writ and statement of claim was irregular and that in any event she had a defence of merits. The plaintiffs on the other hand, opposed encl 28 on the grounds that: (a) encl 28 was filed out of time; (b) the service of the cause papers was complete and in order; and (c) the defendant did not have a defence of merits.

I

Held, allowing the application:

(1) The learned judge emphasised that no AR card was produced. Given the denial under oath in the relevant affidavit affirmed by the defendant in having received the writ and the statement of claim, the failure of the

plaintiffs to contradict the same by producing the requisite AR card bearing the acknowledgment by the defendant or by someone else on her behalf meant, that the defendant had succeeded in rebutting the presumption of service of the writ and the statement of claim, on a balance of probabilities. Given that the JID had been determined not to be a regular judgment, the JID must be set aside. It was unnecessary to consider whether or not the defendant had a defence of merits (see paras 54–55).

(2) The setting aside application out of time became irrelevant as it had been determined by the court that the writ and the statement of claim that led to the JID had not been regularly served on the defendant in the first place to enable it to be said that the timeline under O 42 r 13 of the RC 2012 had been activated in the manner contended by the plaintiff. Even if there was in this respect a lapse on the part of the defendant (which there was none), considering the circumstances of this case, it was merely a technical non-compliance which did not prejudice the plaintiffs and ought to be curable by O 1A or O 2 r 1(1) of the RC 2012. In light of the foregoing, as service under O 10 r 1 of the RC 2012 was found to have not been effected regularly, the JID granted by the court was therefore set aside (see paras 56 & 60).

[Bahasa Malaysia summary

Ini adalah permohonan defendan untuk mengetepikan penghakiman ingkar ('PI') yang diperoleh oleh plaintif. Plaintif adalah pasangan suami isteri. Plaintif kedua adalah bekas suami defendan. Ia adalah kes plaintif bahawa defendan telah memuat naik satu kiriman di akaun Facebooknya yang mengandungi beberapa kenyataan berunsur fitnah dan palsu, dan yang memberi pandangan negatif terhadap imej dan personaliti plaintif. Akibatnya, plaintif telah menghantar surat tuntutan kepada defendan bagi memohon, antara lain, permohonan maaf rasmi daripada defendan, serta sejumlah RM1 juta kepada setiap plaintif, berkaitan dengan kiriman fitnah tersebut. Oleh sebab defendan tidak mengendahkan tuntutan tersebut, plaintif meneruskan untuk memfailkan tindakan writ pada 24 Disember 2019, yang mana writ dan pernyataan tuntutan didakwa telah disampaikan kepada defendan pada 27 Disember 2019. Memandangkan defendan tidak memfailkan memorandum kehadiran, plaintif memperoleh PI terhadap defendan pada 20 Februari 2020. Dalam meneruskan penguatkuasaan PI tersebut, plaintif memperoleh pada 13 Oktober 2020, perintah taksiran ganti rugi bertarikh 9 Oktober 2020 yang mana defendan telah diperintahkan untuk membayar, antara lain, ganti rugi yang ditaksirkan sebanyak RM300,000 kepada plaintif. Defendan muncul semula pada 30 November 2020 apabila beliau memfailkan notis permohonan melalui lampiran 28 menurut A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk mengetepikan PI pada 20 Februari 2020. Inti pati hujahan defendan adalah penyampaian writ dan

pernyataan tuntutan adalah tidak teratur dan dalam apa jua keadaan beliau mempunyai pembelaan bermerit. Plaintif sebaliknya menentang lampiran 28 atas alasan bahawa: (a) lampiran 28 telah difailkan di luar masa; (b) penyampaian kertas kausa telah lengkap dan teratur; dan (c) defendan tidak mempunyai pembelaan bermerit.

Diputuskan, membenarkan permohonan:

(1) Hakim yang bijaksana menekankan bahawa tidak ada kad AR dikemukakan. Memandangkan penafian secara bersumpah dalam afidavit berkaitan yang diikrarkan oleh defendan dalam menerima writ dan pernyataan tuntutan, kegagalan plaintif untuk menentang perkara yang sama dengan mengemukakan kad AR yang diperlukan yang mengandungi pengakuan oleh defendan atau oleh orang lain bagi pihaknya bermaksud, defendan telah berjaya menyangkal anggapan penyampaian writ dan pernyataan tuntutan, atas imbangan kebarangkalian. Memandangkan PI telah diputuskan sebagai penghakiman yang tidak teratur, PI mesti diketepikan. Ia tidak perlu dipertimbangkan sama ada defendan mempunyai pembelaan bermerit atau tidak (lihat perenggan 54–55).

(2) Permohonan untuk mengetepikan di luar masa menjadi tidak relevan kerana ia telah diputuskan oleh mahkamah bahawa writ dan pernyataan tuntutan yang membawa kepada PI tidak disampaikan secara teratur kepada defendan sejak awal lagi untuk membolehkan pernyataan bahawa garis masa di bawah A 42 k 13 KKM 2012 telah diaktifkan dengan cara yang dihujahkan oleh plaintif. Walaupun sekiranya dalam hal ini terdapat kelewatan oleh defendan (yang mana tidak ada), berdasarkan keadaan kes ini, ia hanyalah ketidakpatuhan teknikal yang tidak memprejudiskan plaintif dan semestinya dapat dipulihkan oleh A 1A atau A 2 k 1(1) KKM 2012. Justeru itu, memandangkan penyampaian di bawah A 10 k 1 KKM 2012 didapati tidak dilaksanakan secara teratur, PI yang dibenarkan oleh mahkamah dengan itu harus diketepikan (lihat perenggan 56 & 60).]

Cases referred to

Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd) v HIB-C Industries Sdn Bhd & Ors [2013] 3 MLJ 41; [2013] 5 CLJ 689, CA (refd)

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413; [1994] 2 CLJ 1, SC (folld)

Evans v Bartlam [1937] AC 473, HL (refd)

Goh Teng Whoo & Anor v Ample Objectives Sdn Bhd [2021] 3 MLJ 159; [2021] 4 CLJ 348, FC (folld)

HSBC Bank (M) Bhd v Wui Ling Timber (Bintulu) Sdn Bhd and Anor [2000] 8 CLJ 197, HC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp

Bhd [1994] 1 MLJ 312, SC (refd)
Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal [2013] 6 MLJ 765, FC (folld)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1996] 1 AMR 846, CA (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (refd)
Lau Pick Huong v Soh Huang Siah [2015] 7 MLJ 325; [2014] 8 CLJ 488, HC (refd)
MBF Finance Berhad v Tiong Kieng Seng [2001] MLJU 405; [2001] 4 CLJ 38, HC (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647, CA (refd)
OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors [2001] 5 MLJ 129, HC (refd)
RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal [2016] MLJU 934; [2016] 6 AMR 668, HC (refd)
Tajudeen bin M K Syed Mohamed v ZMS Construction [2018] MLJU 535; [2018] 5 MLRH 72, HC (refd)
Tan Tin Swee v Kangar Properties Sdn Bhd [1990] 3 MLJ 167, HC (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 12
Rules of Court 2012 O 1A, O 2 r 1(1), O 3 r 5, O 10 r 1, O 13 r 8, O 42 r 13
Rules of the High Court 1980 O 2

Nursyahirah bt Ramli (Muhammad Izzat bin Dzulkafli with her) (Nurul Hafidzah & Assoc) for the plaintiffs.
Rizwana bt Jamal Abdul Nazad (Nor Zabetha & Co) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This was an application for a judgment in default entered against the defendant to be set aside. At the end of the hearing, this court allowed the same in light of the recent decision of the Federal Court concerning service of documents. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[2] The plaintiffs are spouses. The second plaintiff was formerly the husband to the defendant. There were divorced on 30 January 2018.

[3] On 28 March 2018 the plaintiffs found out that the defendant had uploaded a posting on her Facebook account which they pleaded to contain several defamatory and false statements, and which put a negative light on the image and personality of the plaintiffs.

[4] It was alleged that the defendant had continuously made defamatory remarks which had in turn caused her friends to post further allegedly defamatory statements. As a result, the plaintiffs pleaded that they had suffered emotional stress, depression, and extreme shame especially when dealing with family members, close friends, colleagues, neighbours, clients and everyone who personally knew them.

[5] In consequence, on 12 September 2019, the plaintiffs, through their solicitors, Messrs Nurul Hafidzah & Associates had sent out a letter of demand to the defendant, seeking among others, a formal apology from the defendant, as well as a sum of RM1m to each of the plaintiffs, attributed to the said defamatory postings.

[6] As the defendant did not accede to the demand, the plaintiffs, through their solicitors proceeded to file a writ action on 24 December 2019, which writ and statement of claim were then served on the defendant on 27 December 2019. However, because the defendant did not file a memorandum of appearance, the plaintiffs decided to file a notice of application to enter judgment in default of appearance against the defendant.

[7] A judgment of default ('JID') was granted by this High Court (another judge) on 20 February 2020. Several months later, in pursuing the enforcement of the JID, the plaintiffs obtained on 13 October 2020, a *perintah taksiran ganti rugi* dated 9 October 2020 allowed by the deputy registrar, in respect of which the defendant was ordered to pay, among others, damages assessed at RM300,000 to the plaintiffs.

[8] And the defendant seems to have surfaced only on 30 November 2020 when she filed a notice of application pursuant to O 42 r 13 of the Rules of Court 2012 ('the RC 2012') to set aside the JID of 20 February 2020. This application, in encl 28 also prayed for the defendant to be allowed to enter appearance within seven days from the order of the court setting aside the JID and that a defence statement be filed within 14 days from the same date of the order.

[9] The crux of the defendant's contention is that service of the writ and statement of claim was irregular and that in any event she had a defence of merits.

[10] The plaintiffs on the other hand, opposed this application. They put forward three principal reasons which may be conveniently summarised as first, the said application in encl 28 was filed by the defendant out of time; secondly, the service of the cause papers was complete and in order, and thirdly the defendant did not have a defence of merits.

[11] The application and the grounds in support, and the opposition of the plaintiffs will be discussed next.

ANALYSIS AND FINDINGS

Whether the setting aside application was filed out of time

[12] The plaintiffs contended that the defendant's application is defective as it was made beyond the timeline prescribed under O 42 r 13, the basis upon which the application was filed as is evident from the prayers in the notice of application. Given that the plaintiffs had served on the defendant the sealed JID on 3 July 2020, the defendant should have filed this application 30 days from the service date, which was by 2 August 2020.

[13] This time stipulation is prescribed in O 42 r 13 of the RC 2012 which reads as follows:

> Setting aside or varying judgment and orders (O 42 r 13)
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> Save as otherwise provided in these rules, where provisions are made in these rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[14] The defendant however only filed this application on 30 November 2020, which was almost four months late. In addition, neither did the defendant file an application under O 3 r 5 for an extension of time to allow the defendant to file this application. The plaintiffs therefore submitted the application should not be considered as it did not comply with the provisions of O 42 r 13.

[15] The defendant denied having been served with the cause papers that led to the JID and explained that it was because of the service of the *perintah taksiran ganti rugi* (and not the cause papers on the writ and the statement of claim) that she had been made aware of the JID obtained against her.

[16] Now even if the defendant contended that she was applying to set aside the *perintah taksiran ganti rugi* dated 9 October 2020 (and served on 23

October 2020), this is not stated in the notice of application, and that in any event, pursuant to O 42 r 13, the cut off date for the filing an application to set aside the said *perintah taksiran ganti rugi* would be, according to the plaintiffs, on 22 November 2020. But as stated, the defendant however only filed this application on 30 November 2020. Also, apparently, out of time.

[17] On the other hand, the defendant asserted that she was only made aware of the JID on 30 October 2020 when she got hold of the *perintah taksiran ganti rugi* despite the plaintiffs claiming this was actually served on 23 October 2020.

[18] It is not only true but also trite that a satisfactory explanation for any non-compliance with the provisions of the RC 2012 is a key consideration in the exercise of judicial discretion on the matter. In the case of *RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] MLJU 934; [2016] 6 AMR 668, I held that failure by an appellant to send a draft index in the absence of a satisfactory explanation is fatal, as follows:

> [16] It is to be emphasised that the appellant did not offer any explanation for the failure other than to submit that it was curable and did not cause any prejudice to the respondent. It is observed that it has become fashionable for those in default to argue, as the appellant did in the instant case, that the non-compliance is a mere irregularity and all too conveniently call in aid of the ubiquitous O 1A and O 2 rr 1 and 3 of the RC 2012 which read as follows:
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> ...
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> [17] But O 1A and O 2 are not and cannot be the true answer to every transgression of the rules of court. The court will not cure the failure to comply with requirements which are mandatory in nature such as those encapsulated in O 55 of the RC 2012. Where rules are mandatory, and explanation for the violations deemed unacceptable, considerations of lack of prejudice and absence of substantial miscarriage of justice to the respondent, whilst relevant, become secondary. When explanation for the non-compliance is not forthcoming or not acceptable, the infringement is more likely to have been intentional or at the minimum involve a reckless disregard for the rules of court, which the court will at any rate not countenance.
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> ...
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> [19] In my judgment, the failure by the appellant to strictly comply with the relevant requirements of O 55, particularly when no explanation for the non-compliance is forthcoming, constitutes a fundamental irregularity of a nature which is undeserving of attracting the application of the curative provisions of O 1A and O 2 of the RC 2012. They instead constitute a nullity and renders the appeal defective and incompetent. I therefore allow the preliminary objection of the respondent in respect of the failure on the part of the appellant to provide the draft index.

[19] The consequence for non-compliance is no less settled. The application should be refused. In the Federal Court decision in *Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal* [2013] 6 MLJ 765, a case cited by the respondent, Suriyadi FCJ held instructively thus:

> [12] In other words a party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within thirty days after receipt of the order or judgment by him. *If the application is made outside the thirty day period, unless time is enlarged, the application must fail* (*Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 3 CLJ 108). *Whether an enlargement of time will be granted, on the premise that an application was been filed, will depend very much on the facts and circumstances of that application* (*VVDN Sockalingam Chettiar and two others v KRPRSM Somasundaram Chettiar* [1941] 1 MLJ 103 (CA)).
>
> [13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls 129–130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was out of time by at least a year. Despite knowing that encls 129–130 were filed pursuant to O 42 r 13 of the RHC the appellant had disregarded the time factor prescribed to regularise the application. With no application filed to extend time pursuant to O 3 r 5 of the RC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), encls 129–130 were incompetent.
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> [14] The failure to adhere to the preliminary requirement to extend time in the circumstances of the case must be dealt with strictly, as otherwise the rules requiring an extension of time will end up as a dead letter. They, prima facie, must be obeyed for otherwise the party in breach of the rules will defeat the very purpose and object of the need to observe the time line (as an analogy see *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105; [1982] CLJ Rep 616). (Emphasis added.)

[20] Although not submitted by parties, I should also state that case law authorities have held that where there is delay on the part of a defendant, to act with reasonable promptitude to apply to set aside a default judgment within the stipulated 30 day period, it is incumbent upon the defendant to discharge the burden of proffering a satisfactory explanation for the delay. Thus, if there is no explanation for the delay and there is no application for an extension of time to apply, the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647 held that the setting aside application should be dismissed *in limine*, without considering the merits of the application.

[21] Whether any purported explanation in a given case is satisfactory or otherwise would plainly be dependent on the facts and circumstances of each application and it is for the court to exercise its discretion to make the determination (see the Court of Appeal decision in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1996] 1 AMR 846).

[22] Now, it is however very important to appreciate that the defendant in this case before me sought to advance the explanation that she was *not late* in making the application to set aside the JID because she got notice of the JID by virtue of the *perintah taksiran ganti rugi* which she claimed to have received (after having been notified by the residence's management office) only on 30 October 2020.

[23] It is useful to reiterate that the plaintiffs' position is that the cause papers were served on 27 December 2019. The JID which resulted therefrom was served on 3 July 2020, and the *perintah taksiran ganti rugi* which followed was served on 23 October 2020. The defendant, in contrast said she first got notice of the *perintah taksiran ganti rugi* from which she became aware of the JID only on 30 October 2020.

[24] As the defendant has denied receipt of service of the JID as contended by the plaintiffs it is incumbent on the former to demonstrate that service was regular. As it is also the principal submission of the defendant for this setting aside application that service was not regular, the plaintiffs must clearly show otherwise. I will therefore defer and conclude my finding on this contention of the plaintiffs that the defendant's application was made out of time in the analysis on the question of whether the service was regular in the first place, in the section that follows.

Whether service of cause papers regular

[25] It is well-established that the court has the power to set aside judgments under O 13 r 8 of the RC 2012. It is equally settled that if a judgment in default of appearance is adjudged to be an irregular judgment, the defendant is entitled to have it set aside *ex debito justitiae* (see *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129).

[26] The overarching principle in this situation, as enunciated by Lord Atkin in *Evans v Bartlam* [1937] AC 473 is that until and unless the court has pronounced a judgment upon merits or by consent, the court will have the power to set aside the judgment which has been obtained by the failure to follow any of the rules of procedure.

[27] On the issue of service, reference ought to be made to O 10 r 1 of the RC 2012 which reads:

> General Provisions (O 10 r 1)
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> (1) Subject to the provision of any written law and these rules, a writ shall be served personally on each defendant or sent to each defendant by prepaid AR registered

post addressed to his last known address and in so far as is practicable, the first attempt must be made not later than one month from date of issue of the writ.

[28] The plaintiffs argued that given the past relationship of the second plaintiff and the defendant who were now divorced, and with an ongoing proceeding before the Syariah Court, the plaintiffs opted to effect service by way of AR registered post, to the last known address of the defendant as well as to the address stated by the defendant herself in her affidavit in reply in respect of the suit in the Syariah Court. This of course the plaintiffs were perfectly entitled to pursue.

[29] The defendant however claimed that when she went to receive the documents on 30 October 2020, she was surprised to see that there is a *perintah taksiran ganti rugi* entered against her in this current suit that was completely unknown to her at the material time. In other words, the only cause paper related to this current suit ever received by the defendant is this *perintah taksiran ganti rugi.*

[30] The defendant's solicitors at that time were also surprised to learn that the plaintiffs' solicitor had never attempted to clarify whether service of cause papers against the defendant could be effected at the defendant's solicitors' office. In fact, the defendant's previous solicitors had acted for the defendant in issuing a reply on 18 September 2019 to the notice of demand of the plaintiffs dated 12 September 2019. Further, the defendant also asserted that the plaintiff and their solicitors too should be aware that the defendant had through her solicitors had also just several weeks prior issued a letter of demand to them dated 27 August 2020.

[31] Significantly the defendant made the point that there were ample opportunities for the plaintiffs (and in order to avoid unnecessary confrontations), or for their solicitors to effect the service of not only the JID, but also all the cause papers filed in this suit by way of personal service to the defendant since the plaintiffs and defendant are also parties in the divorce related proceedings in Mahkamah Tinggi Syariah Kuala Lumpur.

[32] The defendant was therefore justified in her reference to the case of *Lau Pick Huong v Soh Huang Siah* [2015] 7 MLJ 325; [2014] 8 CLJ 488, where the High Court observed as follows:

> Thus I would have expected that the plaintiff's lawyers should have communicated with the defendant's lawyers on whether they have instruction to accept service of process.

[33] However more pertinently for present purposes, in reply to the defendant's contention that the plaintiffs did not show the acknowledgement receipt of the AR card, the plaintiffs argued that nowhere in the RC 2012 is it mentioned that the acknowledgment of service by prepaid AR registered post must be exhibited as proof of regular service. This is accurate. The plaintiffs have also correctly referred to the often-quoted authority on the non-necessity of showing acknowledgement of the AR card.

[34] This is often attributed to the Court of Appeal case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112 which held in respect of service of writ of summons by AR registered post that proof of sending prepaid AR registered is sufficient, as follows:

> [20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid AR registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67; [2003] 6 CLJ 326:
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> > In fact under sub-r 1(1) of O 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being 'Yanti' (not the name of the defendants) did not vitiate that service.

[35] The Federal Court has also earlier in *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1994] 2 CLJ 1 held authoritatively as follows:

> Although the words 'shall be deemed' in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the cases cited above.

[36] It has also been ruled by the High Court in *MBF Finance Berhad v Tiong Kieng Seng* [2001] MLJU 405; [2001] 4 CLJ 38 that if delivery is by post, showing proof of posting is sufficient to rely on presumption of service. Further, in any event, the first defendant did not show evidence of non-delivery of the registered letter. In the case of *HSBC Bank (M) Bhd v Wui Ling Timber (Bintulu) Sdn Bhd and Anor* [2000] 8 CLJ 197, the High Court stated thus:

Letter of demand was sent by registered post to an agreed address of the first respondent and deemed under cl 21 to have been received by the first respondent. It is not enough for the first respondent to merely say they have not received it but they must go further to procure a letter from the postal authority to state that such a registered letter was not posted or delivered to the said address.

[37] There is consistently, also authority which held that it is immaterial whether a notice of demand was actually delivered or not. It is sufficient to prove that the notice of demand was properly addressed and put in the post notwithstanding that the said notice might subsequently be returned undelivered by postal authorities (see the decision of the Court of Appeal in *Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd) v HIB-C Industries Sdn Bhd & Ors* [2013] 3 MLJ 41; [2013] 5 CLJ 689).

[38] Nevertheless I should emphasise that the decision in this case would concern service of cause papers that led to the JID because what is being applied for by the defendant presently is to have the JID set aside. This directly challenges the service of the cause papers — the writ and the statement of claim which were claimed not to have been properly served on and received by the defendant. This is where O 10 r 1 of the RC 2012 referred to earlier assumes great importance.

[39] It is of interest to note that the defendant did refer to the High Court decision in *Tajudeen bin MK Syed Mohamed v ZMS Construction* [2018] MLJU 535; [2018] 5 MLRH 72. This case held that if and when a plaintiff opts to serve a judgment in default by way of AR registered post, the plaintiff thereby bears the burden to prove that the defendant must have receipt of the said judgement, and that the person acknowledging receipt on the AR card must be none other than the defendant himself.

[40] I reiterate that in this case before me the plaintiffs have not produced a single AR registered card in respect of any of the service of the cause papers. And thus none was shown in relation to the service of the writ and statement of claim.

The ruling of the apex court in Goh Teng Whoo & Anor v Ample Objectives Sdn Bhd

[41] The Federal Court in a very recent decision in *Goh Teng Whoo & Anor v Ample Objectives Sdn Bhd* [2021] 3 MLJ 159; [2021] 4 CLJ 348 has since clarified the law on this very issue. And this in my view readily provides the complete answer to this setting aside application.

[42] It was ruled that the service of a writ by way of AR registered post does not mean, conclusively, that the defendant has received the same. The absence of an AR registered card ('AR card') stating an endorsement as to receipt of the writ by the defendant or another person who is authorised to accept service on his behalf, would result in the JID being set aside.

[43] In the setting aside application filed by the appellants where they claimed that the JID was made based on writs that were irregularly served against them, it became clear that the AR card in relation to the service to the first appellant was received and signed by the his estranged brother who did not inform the first appellant of the same while the AR card in respect of the second appellant was not returned.

[44] Both the High Court and Court of Appeal held based on authorities that there was no requirement for the AR cards to be exhibited in the affidavit of service before a judgment in default of appearance may be entered.

[45] The Federal Court subsequently granted leave to the appellants to pose the following question of law:

> Whether, considering the relevant provisions in O 10, 13, and 62 of the Rules of Court and s 114(f) of the Evidence Act and s 12 of the Interpretation Acts 1948 and 1967, where service of a writ is alleged to have been carried out by way of sending the same to a defendant by AR registered post pursuant to O 10 r 1(1) of the Rules of Court 2012, can the court seal a judgment in default of appearance notwithstanding that the affidavit of service does not exhibit the AR registered card containing an endorsement as to receipt by the defendant himself or someone authorised to accept service of the same on his behalf?

[46] The Federal Court overturned the decisions of the High Court and the Court of Appeal. The answer was unanimously in the negative, with the following passage from the judgment for the court delivered by Abdul Rahman Sebli FCJ being of importance:

> [43] For all the reasons aforementioned, our answer to the leave question is in the negative, that is to say, where service of a writ is alleged to have been effected by way of sending the same to a defendant by AR registered post pursuant to O 10 r 1(1) of the Rules of Court 2012, the court cannot seal a judgment in default of appearance where the affidavit of service does not exhibit the AR registered card containing an endorsement as to receipt by the defendant himself or someone authorised to accept service of the same on his behalf.

[47] The Federal Court thus answered the leave question in the negative in that the court cannot seal a JID of appearance in the absence of proof of service, and that this proof is to be produced in the affidavit of service exhibiting the AR card which contains an endorsement acknowledging receipt by the defendant

himself, or if the endorsement is not made by the defendant himself, the affidavit of service showing that the indorser was someone authorized by the defendant to accept service of the writ on his behalf.

[48] In dealing with the issue of effective service by way of AR registered post, the Federal Court referred to s 12 of the Interpretation Acts 1948 and 1967 and held that where a document is served by registered post, service and time of service are presumed until the contrary is proved. It was observed that s 12 does not state that merely by posting the writ by registered post, the plaintiff has conclusively proven he has served the document.

[49] The Federal Court thus emphasised that s 12 of the Interpretation Acts 1948 and 1967 must be read to mean that where a document is served by registered post, service and time of service are 'presumed' 'until the contrary is proved'. It is thus a rebuttable presumption of law that can be displaced by evidence to the contrary. As such, where evidence is adduced to show that a defendant has not been served with the document, the presumption is rebutted, and the court will make a finding that no service was effected.

[50] The presumption of service under the said s 12 would however only become applicable if the writ has been sent by registered post to the proper address of the defendant. Failure to do so will render the service bad in law and no judgment in default can be entered against the defendant unless there is evidence to prove that service by post had been effected without the aid of the presumption.

[51] The Federal Court held that only the defendant or someone authorised by the defendant can accept service of document. In that case, in respect of the first appellant, the person who accepted the AR card was held not to be an authorised person because he was the estranged brother of the first appellant defendant who did not inform the first appellant defendant about the document. And no AR card was even produced in respect of the second appellant.

[52] Thus in that case, the Federal Court found that there was sufficient merit to the issues raised by the appellants in their denial of receipt of the writs. In essence, their denials were substantiated by the respondent's failure to produce the requisite AR cards duly signed by the appellants or their authorised representatives. This further meant that the respondent had not succeeded in contradicting the assertions of the appellants who had denied service under oath, resulting in the finding that the presumption of service under s 12 of the Interpretation Acts had been rebutted, on a balance of probabilities.

[53] The appellants were thus successful in rebutting the presumption by contending that they had not received the writs, and in their reliance on the respondent's failure to produce the returned AR cards, with the requisite acknowledgement, or at all. The writs were therefore determined to have been irregularly served, resulting in the dismissal and setting aside of the JID against the appellants.

[54] Guided by the clear pronouncement in *Goh Teng Whoo*, much of the assessment on service would in my view still be fact-sensitive and should therefore be balanced with considerations to deal with the frivolity of assertions that could potentially and conveniently be made by defendants who prefer to be evasive. In the instant case before me, however, I emphasise that no AR card was produced. As such given the denial under oath in the relevant affidavit affirmed by the defendant in having received the writ and the statement of claim, the failure of the plaintiffs to contradict the same by producing the requisite AR card bearing the acknowledgment by the defendant or by someone else on her behalf, in the circumstances of the case mean, on the authority of *Goh Teng Whoo* that the defendant has succeeded in rebutting the presumption of service of the writ and the statement of claim, on a balance of probabilities.

[55] Given that the JID has been determined not to be a regular judgment, I hold that the JID must be set aside. It is unnecessary to consider whether or not the defendant has a defence of merits based on the principles enunciated in cases such as the Supreme Court decision in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 and the Federal Court decision in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305. It is in other words unnecessary for this court to decide whether the defendant should be accorded her day in court to prove the extent of truth of the said posting and the alleged damages suffered by the plaintiffs in order to retain the notion of justice and provide a fair medium for both parties to present their cases.

[56] Consequently the question, discussed earlier, as to whether the defendant filed this setting aside application out of time becomes irrelevant now that it has been determined by this court that the writ and the statement of claim that led to the JID had not been regularly served on the defendant in the first place to enable it be said that the timeline under O 42 r 13 of the RC 2012 had been activated in the manner as contended by the plaintiff. Even if there was in this respect a lapse on the part of the defendant (which there is none), considering the circumstances of this case, this was merely a technical non-compliance which did not prejudice the plaintiff and ought to be curable by O 1A or O 2 r 1(1) of the RC 2012.

[57] Order 1A, for completeness, reads:

> Regard shall be to justice (O 1A)
>
> In administering these rules, the court or a judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these rules.

[58] And O 2 r 1(1) states:

> 1 Non-compliance with rules (O 2 r 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) These rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. The parties are required to assist the court to achieve this overriding objective.
>
> (3) The court or judge may, on the ground that there has been such non-compliance as referred to in para (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these rules, exercise its or his discretion under these rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

[59] It bears emphasis that O 1A and O 2 r 1(1) could be invoked to cure any technical irregularities which have not been shown to have caused any prejudice to the other party. In the High Court decision in *Tan Tin Swee v Kangar Properties Sdn Bhd* [1990] 3 MLJ 167 which was decided even before the introduction of O 1A, KC Vohrah J (as he then was) ruled that non-compliance with the requirements are irregularities that were ordinarily curable under O 2 of the then Rules of High Court 1980.

CONCLUSION

[60] Accordingly in light of the foregoing, as service under O 10 r 1 of the RC 2012 was found to have not been effected regularly, the JID granted by this court earlier is therefore set aside. Enclosure 28 is allowed.

Application to set aside judgment in default allowed.

Reported by K Selvaraju